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In this chapter. . .

This chapter discusses the rules governing pleas in delinquency cases other than pleas to alleged probation violations. Pleas to alleged probation violations are discussed in Chapter 13. For discussion of the court-rule requirements for plea proceedings in criminal cases, see Section 18.1. For discussion of a victim's right to confer with the prosecution and to make a statement at a plea proceeding, see Section 4.3(E).

Note on court rules. On February 4, 2003, the Michigan Supreme Court approved extensive amendments to Subchapter 5.900 of the Michigan Court Rules, which govern delinquency, minor PPO, designated case, and “traditional waiver” proceedings, and to Subchapter 6.900, which govern “automatic waiver” proceedings. Subchapter 5.900 was renumbered Subchapter 3.900. These rule amendments are effective May 1, 2003. Although not in effect on the publication date of this benchbook, the rule amendments have been included here. For the rules in effect prior to May 1, 2003, see the first edition of this benchbook, *Juvenile Justice Benchbook: Delinquency & Criminal Proceedings* (MJJ, 1998).

8.1 Parties' Right to Have Judge Take Plea

MCR 3.912(B) provides that the parties have a right to a judge at a hearing on the formal calendar. The parties in a delinquency proceeding are the petitioner and juvenile. MCR 3.903(A)(18)(a). MCR 3.903(A)(10) defines formal calendar as judicial proceedings other than a delinquency proceeding on the consent calendar, a preliminary inquiry, or a preliminary hearing of a

delinquency proceeding. Thus, the parties have a right to have a judge conduct a plea proceeding.

Rules governing referees who conduct plea proceedings. If a party has not demanded that a judge take a juvenile's plea, a referee may be assigned to conduct the plea proceedings. MCR 3.913(A)(1). A referee may not, however, enter an order of adjudication following plea proceedings. MCL 712A.10(1)(b) and (c) state that if a referee is to conduct a hearing, he or she must:

“(b) Administer oaths and examine witnesses.

“(c) If a case requires a hearing and the taking of testimony, make a written signed report to the judge . . . containing a summary of the testimony and a recommendation for the court's findings and disposition.”

*See Chapter 12 for rules governing judicial review of a referee's recommendations.

“Neither the court rules nor any statute permits a hearing referee to enter an order for any purpose.” *In re AMB*, 248 Mich App 144, 217 (2001). A referee's recommendation cannot be accepted without judicial examination. *Id.*, citing *Campbell v Evans*, 358 Mich 128, 131 (1959).*

MCR 3.913(A)(2)(a) provides that except as otherwise provided in MCL 712A.10, only a person licensed to practice law in Michigan may serve as a referee at a delinquency proceeding other than a preliminary inquiry or preliminary hearing if the juvenile is before the court for allegedly committing an offense that would be a criminal offense if committed by an adult. Non-attorney referees may conduct plea proceedings in status offense cases.

MCL 712A.10(2) allows a probation officer or county agent who is not a licensed attorney to serve as a referee at a delinquency proceeding other than a preliminary inquiry or preliminary hearing if he or she was designated to serve as referee prior to January 1, 1988, and was acting as a referee on that date.

8.2 Prosecuting Attorney Participation in Plea Proceedings

If the court requests, the prosecuting attorney must review the petition for legal sufficiency and appear at any delinquency proceeding. MCR 3.914(A) and MCL 712A.17(4). If an offense that would be a criminal offense if committed by an adult is alleged, the prosecuting attorney must participate in every delinquency proceeding “that requires a hearing and the taking of testimony.” MCR 3.914(B)(2). MCL 712A.17(4) only requires the prosecuting attorney to *appear* if a criminal offense is alleged and the proceeding requires a hearing and the taking of testimony. Thus, if a status offense is alleged, the prosecuting attorney must appear at a plea hearing if the court requests; if a

criminal offense is alleged, the prosecuting attorney must appear and participate in a plea hearing.

The prosecuting attorney may be a county prosecuting attorney, an assistant prosecuting attorney for a county, the attorney general, the deputy attorney general, an assistant attorney general, or, if an ordinance violation is alleged, an attorney for the political subdivision or governmental entity that enacted the ordinance, charter, rule, or regulation upon which the ordinance violation is based. MCR 3.903(B)(4).

Prosecutorial charging authority and pleas. In delinquency proceedings, the court cannot accept a plea from a juvenile in confession to a lesser-included offense without the concurrence of the prosecutor. *In re Wilson*, 113 Mich App 113, 120–22 (1982). In *Wilson*, the Court of Appeals concluded that during the second phase of a “traditional waiver” hearing, the court cannot accept a plea of admission from a juvenile to a lesser-included offense, thereby assuming jurisdiction over the juvenile as a delinquent, without the concurrence of the prosecutor. The court must allow the prosecuting attorney to present evidence supporting the motion for waiver and determine whether the best interests of the juvenile and public support waiver. *Id.*, citing *Genesee Prosecutor v Genesee Circuit Judge*, 386 Mich 672 (1972), and *Genesee Prosecutor v Genesee Circuit Judge*, 391 Mich 115 (1974) (in criminal cases, acceptance of plea to a lesser-included offense over prosecutor’s objection violates separation of powers doctrine).

8.3 Advice of Right to Counsel

If a juvenile is not represented by an attorney, the court must advise the juvenile of the right to the assistance of counsel at each stage of the proceedings. MCL 712A.17c(1). MCR 3.915(A)(1) states that this advice is required “at each stage of the proceedings on the formal calendar, including . . . plea of admission”*

*See Section 5.7 for further discussion of a juvenile’s right to counsel.

8.4 Plea Procedures

A. Available Pleas

MCR 3.941(A) allows a juvenile to offer a plea of admission or no contest to an alleged offense. That rule states:

(A) Capacity. A juvenile may offer a plea of admission or of no contest to an offense with the consent of the court. The court shall not accept a plea to an offense unless the court is satisfied that the plea is accurate, voluntary, and understanding.”

*See also Section 9.1 for a discussion of the “infancy defense” and a minor’s capacity to form a criminal intent.

*MCR 2.401 applies in delinquency proceedings. See Section 7.1.

This rule explicitly states that juveniles have the capacity to enter pleas of admission or no contest. However, the rule does not provide for a juvenile to enter a plea of “guilty but mentally ill” or “not guilty by reason of insanity.” Compare MCR 6.303 and 6.304, which apply to the taking of such pleas in criminal cases.*

Court’s discretion to accept plea. In criminal cases, there is no constitutional right to have a guilty plea accepted by the court. *North Carolina v Alford*, 400 US 25, 34–35 (1970), citing *Lynch v Overholser*, 369 US 705, 719 (1962). Simply because a factual basis could have been inferred from the facts presented at a guilty plea hearing does not mean the court must accept the plea. The decision to accept or reject a plea is within the court’s discretion. *People v Bryant*, 129 Mich App 574, 577–78 (1983). In addition, MCL 768.35 (the “true plea doctrine”) requires a judge to refuse to accept a guilty plea, or to vacate an accepted plea, where he or she has “reason to doubt the truth of such plea.” See *People v Wolff*, 389 Mich 398, 404 (1973).

In *People v Grove*, 455 Mich 439, 464–65 (1997), the Court found no abuse of the trial court’s discretion in refusing to accept the defendant’s guilty pleas, made pursuant to a plea agreement, where the pleas were tendered after the “plea cutoff date” in a pretrial scheduling order. The trial judge may refuse to accept the defendant’s plea “pursuant to the rules,” which was interpreted to include MCR 2.401(B)(1)(b), governing pretrial scheduling orders.*

B. Understanding, Voluntary, and Accurate Plea

Before accepting a plea of admission or no contest, the court must personally address the juvenile and must comply with the following rules. MCR 3.941(C) and *People v Tallieu*, 132 Mich App 402, 404 (1984) (use of “guilty plea form” does not excuse judge from personally addressing the accused).

- **An Understanding Plea**

To establish that the plea is understanding, the court must tell the juvenile:

“(a) the name of the offense charged,

“(b) the possible dispositions,

“(c) that if the plea is accepted, the juvenile will not have a trial of any kind, so the juvenile gives up the rights that would be present at trial, including the right:

(i) to trial by jury,

- (ii) to trial by the judge if the juvenile does not want trial by jury,
- (iii) to be presumed innocent until proven guilty,
- (iv) to have the petitioner or prosecutor prove guilt beyond a reasonable doubt,
- (v) to have witnesses against the juvenile appear at the trial,
- (vi) to question the witnesses against the juvenile,
- (vii) to have the court order any witnesses for the juvenile's defense to appear at the trial,
- (viii) to remain silent and not have that silence used against the juvenile, and
- (ix) to testify at trial, if the juvenile wants to testify." MCR 3.941(C)(1)(a)–(c).

MCR 3.941(C)(1)(b) requires the court to advise a juvenile of "possible dispositions." A court's failure to inform a juvenile that he or she will be required to register as a sex offender upon adjudication does not require reversal. *In re Lyons*, unpublished memorandum opinion of the Court of Appeals, December 19, 2000 (Docket No. 217858), relying on *People v Davidovich*, 238 Mich App 422, 428 (1999) (the court must advise a criminal defendant of the direct consequences of a guilty plea, not collateral consequences).

To establish a sufficient factual basis in the record for a determination that a plea is understandingly made, it may be necessary to ask questions of the juvenile. For example, the court may want to inquire about the juvenile's age, extent of education, and grades in school. If the juvenile is represented by counsel, the court may want to ask whether he or she has had an adequate opportunity to discuss the plea with his or her attorney. Also, the court may ask if the juvenile is under the influence of drugs, alcohol, or medication, which might affect his or her ability to understand the proceedings.

• A Voluntary Plea

To establish that the plea is voluntary, the court must:

- confirm any plea agreement* on the record, and
- ask the juvenile if any promises have been made beyond those in a plea agreement or whether anyone has threatened the juvenile. MCR 3.941(C)(2)(a)–(b).

*See Section 8.6, below, for further discussion of plea agreements.

- **An Accurate Plea**

To establish that a plea is accurate, the court must determine that there is support for a finding that the juvenile committed the offense. MCR 3.941(C)(3)(a)–(b) and *In re Bailey*, 137 Mich App 616, 623–24 (1984), citing *Guilty Plea Cases*, 395 Mich 96 (1975). MCR 3.941(C)(3)(a)–(b) state:

“(3) An Accurate Plea. The court may not accept a plea of admission or of no contest without establishing support for a finding that the juvenile committed the offense:

(a) either by questioning the juvenile or by other means when the plea is a plea of admission, or

(b) by means other than questioning the juvenile when the juvenile pleads no contest. The court shall also state why a plea of no contest is appropriate.”*

*See Section 8.5, below, for further discussion of no-contest pleas.

To establish factual support for a finding that the accused committed the offense, a court may draw inculpatory inferences from the facts presented, even though exculpatory inferences could also be drawn from those facts. *People v Eloby (After Remand)*, 215 Mich App 472, 477–78 (1996).

C. Support for Plea

The court must also determine whether the juvenile’s parent, guardian, legal custodian, or guardian ad litem supports the juvenile’s plea. MCR 3.941(C)(4) states as follows:

“The court shall inquire of the parent, guardian, legal custodian, or guardian ad litem, if present, whether there is any reason why the court should not accept the plea tendered by the juvenile.”

8.5 Special Requirements for No Contest Pleas

Pleas of no contest must be supported by a sufficient factual basis. Because MCR 3.941(C)(3)(b) requires that means other than questioning the juvenile must be used, resort to a police report, transcripts, or other documents, or an offer of proof by the prosecutor seems justified. The court should get the

agreement of defense counsel if something other than actual testimony is used.

In addition, the court must state why a no-contest plea is appropriate. A number of appropriate reasons to allow acceptance of no-contest pleas have been recognized in criminal cases, including:

- reluctance of the defendant to relate details of a particularly sordid crime;
- severe intoxication impairing the defendant's memory of details of the crime;
- commission of so many crimes that the defendant couldn't remember which was which; and
- minimizing civil liability.

Guilty Plea Cases, 395 Mich 96, 134 (1975). The ultimate test of whether a no-contest plea is appropriate is whether “the interest of the defendant and the proper administration of justice do not require interrogation of the defendant.” *Id.* at 132–33. The court may also wish to consider the treatment implications of a no-contest plea. Effective treatment may depend upon the perpetrator's willingness to admit that he or she committed the offense. If the respondent is unwilling to make this admission in court, he or she may also be reluctant to make an admission in therapy.

When a no-contest plea is offered to a specific intent offense because a criminal defendant was too intoxicated to remember the events surrounding the offense, the prosecution must offer evidence refuting the intoxication defense. Without any refutation, the specific intent element is without a sufficient factual basis. *People v Polk*, 123 Mich App 737, 740–41 (1983).

8.6 Plea Agreements

If there is any plea agreement, the court must confirm the agreement on the record, and the court must ask the juvenile if any promises have been made beyond those in the agreement or whether anyone has threatened the juvenile. MCR 3.941(C)(2)(a)–(b).

“Charge bargaining” and “sentence bargaining.” In criminal cases, plea agreements between a prosecuting attorney and a defendant may be limited to agreement about the offense to which defendant will plead. Plea agreements may also contain terms that “provide for the defendant's plea to be made in exchange for a specific sentence disposition or a prosecutorial sentence recommendation.” MCR 6.302(C)(3). If the prosecutor and defendant agree that the defendant will plead guilty to an offense but the agreement does not address the sentence to be imposed upon the defendant, the court has limited authority to reject the plea agreement. MCR

6.302(C)(3) and Staff Comment to MCR 6.302. However, if the plea agreement contains a “specific sentence disposition” or a “prosecutorial sentence recommendation,” the court does have authority to reject both the underlying plea and the sentence agreement or recommendation. *People v Grove*, 455 Mich 439, 455 (1997). Although juvenile dispositions are often not limited in duration in the same manner as a criminal sentence, “sentence” or “disposition bargaining” may occur in delinquency cases.

In addition to sentence agreements and recommendations, the parties may ask the court for a preliminary sentencing evaluation. In *People v Cobbs*, 443 Mich 276, 283–85 (1993), the Michigan Supreme Court outlined the proper procedure in these cases:

“At the request of a party, and not on the judge’s own initiative, a judge may state *on the record* the length of sentence that, on the basis of the information then available to the judge, appears to be appropriate for the charged offense.

. . . .

“The judge’s preliminary evaluation of the case does not bind the judge’s sentencing discretion, since additional facts may emerge during later proceedings, in the presentence report, through the allocution afforded to the prosecutor and the victim, or from other sources.

. . . .

[T]he victim’s right to participate must be fully recognized. Crime victims have rights provided in the constitution of this state, and implemented by a number of statutory provisions. Among the rights of a crime victim are the right of allocution at sentencing and to provide an impact statement for inclusion in the presentence report. These events will each take place if the victim wishes, and the judge’s final sentencing decision must await receipt of all the necessary information.” (Emphasis in original; footnotes omitted.)*

A presentence report is not required in juvenile delinquency cases. *In re Lowe*, 177 Mich App 45, 47 (1989). In many cases, however, a probation officer or caseworker submits a similar report to the judge prior to disposition.

Fulfilling the terms of a plea agreement. Once the court accepts a plea induced by a plea agreement, the terms of the agreement must be fulfilled.

*See Section 10.7 for a discussion of victim impact statements.

Santobello v New York, 404 US 257, 262 (1971). In *In re Robinson*, 180 Mich App 454, 459 (1989), the Court of Appeals stated:

“A defendant’s rights under *Santobello* . . . to have the prosecutor perform his promise in a plea bargaining agreement does not inure to a defendant until after he has pled guilty or performed part of the plea agreement to his prejudice in reliance upon the agreement. . . . *Santobello* and its progeny do not involve court-compelled performance of a tentative agreement from which the prosecutor has withdrawn prior to judicial approval.” (Citations omitted.)

If the offender has pled guilty in reliance on a bargain with the prosecution, should the prosecution not honor the agreement, courts must specifically enforce the agreement if it can be fulfilled, or if the agreement can no longer be fulfilled, the offender must be allowed to withdraw his or her plea. *Guilty Plea Cases*, 395 Mich 96, 127 (1975).

8.7 Taking Pleas Under Advisement and Plea Withdrawal

MCR 3.941(D) gives the court authority to take a plea under advisement and establishes standards for withdrawal of pleas. This rule states:

“(D) **Plea Withdrawal.** The court may take a plea of admission or of no contest under advisement. Before the court accepts the plea, the juvenile may withdraw the plea offer by right. After the court accepts the plea, the court has discretion to allow the juvenile to withdraw a plea.”*

*See also Section 9.15 (rehearings and motions for new trial under MCR 3.992).

Withdrawal of plea after acceptance. “[I]n order to withdraw a guilty plea before sentencing, the defendant must first establish that withdrawal of the plea is supported by reasons based on the interests of justice. If sufficient reasons are provided, the burden then shifts to the prosecution to demonstrate substantial prejudice. *In the Matter of Raphael Hastie*, unpublished opinion of the Court of Appeals, decided March 28, 2000 (Docket No. 213880), quoting *People v Spencer*, 192 Mich App 146, 151 (1991). To establish that withdrawal is in the interest of justice, the defendant must show a fair and just reason for withdrawal. *Spencer, supra*. Inducement of a plea by inaccurate legal advice, the defendant’s misunderstanding of the ramifications of trial, ineffective assistance of counsel, and the defendant’s inability personally to recount a sufficient basis for the plea may support a finding that withdrawal is in the interest of justice. *Id.* at 151–52. Concern about the potential penalty is not a sufficient basis for withdrawal of a guilty plea. *People v Lafay*, 182 Mich App 528, 530 (1990). The discarding of vital physical evidence or the death of a chief government witness may support a finding that the prosecutor has been

substantially prejudiced because of reliance on a plea; trial preparations and costs are also appropriate considerations in evaluating prejudice. *Spencer, supra* at 150–52.

If the court has not accepted a plea conditioned on the preservation of an issue for appellate review, a juvenile must move to withdraw his or her plea in the trial court to preserve an alleged error in the plea proceedings for appellate review. *In re Zelzack*, 180 Mich App 117, 126 (1989).

8.8 Conditional Pleas

MCR 3.941(B) allows the court to accept a plea of admission or no contest conditioned upon the preservation of an issue for appellate review. Entering an unconditional plea of admission or no-contest plea constitutes a waiver of all issues except “jurisdictional issues,” which preclude the state from ever prosecuting an offender for the offense regardless of his or her factual guilt (e.g., double jeopardy). *People v New*, 427 Mich 482, 491 (1986). Jurisdictional issues include the constitutionality of statutes and court rules applicable to juveniles. *People v Williams*, 245 Mich App 427, 430–31 (2001), and *People v Hogan*, 225 Mich App 431, 438 (1997). A conditional plea of admission under the court rules applicable to juveniles will preserve a non-jurisdictional issue for appeal. *In re Bailey*, 137 Mich App 616, 621 (1984).

8.9 Record of Proceedings at Plea Hearings

MCR 3.925(B) states that “[a] plea of admission or no contest, including any agreement with or objection to the plea, must be recorded.”